

## Failure To Document Can Be Costly Error

*California case demonstrates why agents must get all coverage decisions in writing*

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If any agents or brokers doubt how expensive the simple act of not documenting a client's requests can be, all they need do is review a recent case in California where one brokerage is facing a \$5.8 million judgment.

In that case—*Williams v. Hilb, Rogal & Hobbs Insurance Services of California*—the Court of Appeal of California in Los Angeles upheld a lower court's decision that the broker failed to secure workers' compensation insurance for its client.

According to court papers, the court had to decide if the broker was negligent "in advising on, procuring and maintaining an insurance package for a new business venture" that did not include workers' comp.

In the court's decision, John Daniel Williams and Steven Stuart Simon opened a business—Rhino Linings of Santa Fe Springs, Calif. (Rhino SFS)—that sprayed protective lining onto the beds of pick-up trucks.

In 1999, Mr. Williams, who was responsible for securing insurance for the company, was put in touch with Robyn Thaw of the insurance agency Robert F. Driver Company. She represented herself as knowledgeable about the product and had a "custom designed insurance package" for their operation.

When the policy was secured, Mr. Williams reviewed it and believed everything was in order. Not being experienced with insurance, he was not aware the policy lacked workers' comp coverage.

After switching employers, Ms. Thaw eventually found herself at HRH. During that time, Rhino SFS remained a client, securing coverage through her, but never purchasing workers' comp.

In 2001, an employee of Rhino SFS was severely burned in a spraying accident. Subsequently, the company discovered it did not have workers' comp coverage.

The employee sued and won a judgment for more than \$11 million, of which Rhino SFS was responsible for half. After the jury award, Williams and Simon sued HRH for negligence.

The suit was tried before Judge William J. Birney Jr. without a jury.

Ms. Thaw testified that she thought the client understood there was no workers' comp coverage and would secure it elsewhere. However, there was no documentation or memorandums stating that the plaintiffs were aware of the absence of the coverage, which is required by California law.

There were procedures in place at the agencies to ensure proper documentation, but Ms. Thaw apparently did not follow the procedure, the court papers indicated.

The court found that Ms. Thaw "acted as more than an ordinary agent" regarding the Rhino product, and created new insurance packages for the clients, never including workers' comp coverage.

Mr. Williams and Mr. Simon, Judge Birney said, made a reasonable assumption that they had the proper coverage and relied on Ms. Thaw to secure all necessary coverage. He found their statements on the issue more credible than the broker's.

The appeals court upheld Judge Birney's finding that HRH is responsible to pay \$5.83 million, plus interest and court costs.

Ed Garson, an attorney who specializes in defending complex litigation involving professional liability cases, and a partner in the San Francisco office of the law firm Wilson Elser, noted by e-mail, "*Williams* does not really set a new precedent, but stands for the basic proposition that, 'If it's not in writing, it doesn't exist.'"

He added that "the file should speak for itself. People's recollection is fallible, and in the face of a \$5 million claim, may be viewed by a jury as untrustworthy. A written confirmation can be persuasive evidence of what actually occurred."

As far as what producers should do to avoid such issues, "document your file," Mr. Garson suggested. "Confirm in writing what services you have agreed to perform. If you get in the habit of sending a confirming e-mail as a matter of practice, you can avoid some of these claims, and better defend others."

He added that the *Williams* case "teaches that documenting a decision by your client not to obtain certain coverage may be as important as documenting the terms and conditions of any offer."